Supreme Court, U.S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EUGENE B. DINKIN,

Petitioner,

against

DINU GANEA, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON and ARNOLD WINSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7403

SHIRLEY ADELSON SIEGEL
Solicitor General

PATRICIA C. ARMSTRONG
Assistant Attorney General
of Counsel

Question Presented

Whether the action of state officials in applying a state statute was unconstitutional where state court determinations as to the validity of the statute conflicted with a lower federal court's finding of unconstitutionality which finding was later vacated by the United States Supreme Court?*

---

* Additional claims were raised by the petitioner in the District Court and the Court of Appeals. Petitioner has apparently abandoned such claims as they are not included in his petition to this Court.

TABLE OF CONTENTS

	PAGE
Question Presented	
Decisions Below	1
Jurisdiction	2
Facts	2
The District Court Opinion	4
The Opinion of the Court of Appeals	5
REASON FOR DENYING CERTIORARI:	
The Court below correctly held that the direction to petitioner to appear for a medical examination pursuant to New York Civil Service Law § 72 during the pendency of *Snead* v. *Department of Social Services of the City of New York* was not unconstitutional on the facts presented and in light of contrary state court determinations	6
Conclusion	10
Appendix "1"	11

I. *Cases* PAGE

Antinore v. *State of New York,* 49 A D 2d 6, 371 N.Y.S. 2d 213 (4th Dept. 1975), aff. 40 N Y 2d 921 (1976) 4

Laurido v. *Simon,* 489 F. Supp. 1169 (SDNY 1980) .. 6

Leonard v. *Sugarman,* 466 F 2d 1366 (2d Cir. 1972) .. 8

Matter of Barhite v. *Dyson,* 63 A D 2d 1051, 405 N.Y.S. 2d 816 (3rd Dept. 1978) 8

Matter of Brockman v. *Skidmore,* 43 A D 2d 572, 349 N.Y.S. 2d 120 (2d Dept. 1973) 8

Matter of Cooperman v. *Commissioner,* 86 Misc. 2d 610, 382 N.Y.S. 2d 700 (Sup. Ct. Albany County 1976) 8

Matter of Greenwald v. *Frank,* 47 A D 2d 628, 363 N.Y.S. 2d 955 (2d Dept. 1975) 9

Matter of Penebre v. *Dzaluk,* 51 A D 2d 574, 378 N.Y.S. 2d 767 (2d Dept. 1976) 8

Procunier v. *Navarette,* 434 U.S. 555 (1978) 9

Snead v. *Department of Social Services of the City of New York,* 355 F. Supp. 764 (SDNY 1973) (three-judge court), vacated and remanded *sub nom. Civil Service Commission of New York* v. *Snead,* 416 U.S. 977 (1974), reaffirmed, 389 F. Supp. 935 (SDNY (three-judge court), vacated and remanded for consideration of mootness *sub nom. Civil Service Commission of New York* v. *Snead,* 421 U.S. 982 (1975), motion for entry of judgment granted, 409 F. Supp. 955 (SDNY 1975) (three-judge court), vacated and remanded *sub nom. New York Civil Service Commission* v. *Snead,* 425 U.S. 457, rehearing denied, 426 U.S. 942 (1976) 5, 6, 7, 8, 9

PAGE

United States ex rel. Lawrence v. *Woods*, 432 F. 2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971) 9

Walker v. *Walker*, 51 A D 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976) 9

II. *Constitutional Provisions and Statutes*

First Amendment 5

Fourteenth Amendment 5

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 5

New York Civil Service Law,

§ 72 .....3, 5, 6, 7, 8, 9

§ 75 4

§ 76 4

III. *Other Authorities*

Jurisdictional Statement for Appellants in *Civil Service Commission of the State of New York* v. *Snead*, dated December 4, 1975 8

No. 80-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EUGENE B. DINKIN,

Petitioner,

against

DINU GANEA, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON and ARNOLD WINSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Decisions Below

The orders of the United States Court of Appeals for the Second Circuit denying petitioner's motion for a rehearing containing a suggestion for rehearing en banc were entered on April 8, 1980. Copies of same are set forth as Appendix "1" annexed hereto. The decision of the Court of Appeals is reported at 614 F 2d 1286 (Table) and is re-

produced in Appendix "B" to the petition. The decision of the United States District Court for the Eastern District of New York is unreported and is reproduced in Appendix "A" to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Facts

The facts are undisputed. Petitioner is a former employee of the New York State Department of Mental Hygiene. At the time of his termination from employment with the Department in March, 1975, he held the permanent civil service position of Psychiatric Social Work Assistant III at South Beach Psychiatric Center ("SBPC"), a facility of the Department of Mental Hygiene. Respondents are all employees of the Department of Mental Hygiene who, during the period in question, occupied various positions at SBPC. The events leading to petitioner's termination from employment at SBPC are the subject of the instant action.

Petitioner, in his capacity as a Social Work Assistant III, worked as a clinical therapist at SBPC. He had a full caseload of patients, many of whom had a chronic history of mental illness, and his duties included managing his patients' medication, providing supportive psychotherapy and various administrative matters such as arranging for psychiatric evaluations, referrals of patients for rehabilitation and attendence at staff meetings.

For many months prior to petitioner's termination from employment at SBPC, various co-workers and supervisors had become disturbed by the strange and bizarre behavior being exhibited by petitioner, for example, inappropriate,

threatening and hostile responses to otherwise innocuous situations, a preoccupation with the asserted homosexuality of a large number of his co-workers, his stated fears and negative physical reaction to working on church property in the presence of priests and nuns, whom he considered to be perverted. Repeated instances of such behavior prompted several of petitioner's superiors, some of whom are psychiatrists, to the conclusion that petitioner was seriously disturbed and should not be in contact with emotionally disturbed patients.

Following petitioner's rejection of a recommendation of a medical leave of absence, SBPC twice sought and obtained an appointment for petitioner at the New York State Employee Health Service pursuant to authority granted under New York Civil Service Law § 72(1).* While informed of both appointments and the consequences of his failure to keep them, petitioner kept neither appointment.

On the basis of petitioner's failure to comply with the direction of SBPC regarding the medical examination,

---

* That section states as follows:

"1. When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit."

on February 10, 1975, he was suspended with pay and served with a notice of discipline which outlined the charges against him, i.e., insubordination for failure to keep the above described appointments, and the procedures available to him to contest the charges and the proposed penalty of termination from employment at SBPC. Petitioner filed a grievance in opposition to the notice of discipline and thereby commenced the grievance procedure under Article 33 of his union's contract with the State.* A meeting pursuant to such procedure was scheduled and petitioner was so informed. Prior to the completion of the procedure, which would have afforded him a hearing before an impartial arbitrator with the right to representation by an attorney, petitioner withdrew his grievance. Thereafter, on March 25, 1975, in accordance with the notice of discipline and section 33.4(d)** of the State-CSEA agreement, SBPC informed petitioner that his employment was terminated effective February 24, 1975. Through the use of accrued vacation credits, he was paid through March 12, 1975.

The District Court Opinion

Petitioner brought this action in the United States District Court for the Eastern District of New York in

---

* The disciplinary procedure followed was in accordance with the requirements of the contract between plaintiff's union, the Civil Service Employee Association ("CSEA") and New York State. A copy of the applicable agreement is an Appendix to the District Court's decision. The disciplinary procedure provided in this agreement is in lieu of the procedure prescribed in New York Civil Service Law §§ 75 and 76. See *Antinore* v. *State of New York*, 49 A D 2d 6, 371 N.Y.S. 2d 213 (4th Dept. 1975), aff., 40 N Y 2d 921 (1976) in which the constitutionality of the arrangement was upheld.

** Section 33.4(d) states as follows:

> "The penalty proposed, or such other penalty as directed by the arbitrator, may not be implemented (a) until the employee fails to file a grievance within 10 days, (b) fails to file a timely appeal as provided below, or until and to the extent that it is upheld by the disciplinary arbitrator."

September, 1975 pursuant to 42 U.S.C. § 1983 and sought compensatory and punitive damages in excess of $200,000 against respondents for their alleged violation of his rights under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pendent state claims were also included. On January 24, 1979, the District Court (COSTANTINO, J.) granted respondents' motion for summary judgment in their favor. In its opinion, the District Court found, *inter alia,* that the direction to petitioner to appear for a medical examination pursuant to Civil Service Law § 72 was proper. The existence of a lower federal court determination of the unconstitutionality of Section 72 in *Snead* v. *Department of Social Services of the City of New York,* 355 F. Supp. 764 (SDNY 1973) (three-judge court), vacated and remanded *sub nom. Civil Service Commission of New York* v. *Snead,* 416 U.S. 977 (1974), reaffirmed, 389 F. Supp. 935 (SDNY) (three-judge court), vacated and remanded for consideration of mootness *sub nom. Civil Service Commission of New York* v. *Snead,* 421 U.S. 982 (1975), motion for entry of judgment granted, 409 F. Supp. 955 (SDNY 1975) (three-judge court), vacated and remanded *sub nom. New York Civil Service Commission* v. *Snead,* 425 U.S. 457, rehearing denied, 426 U.S. 942 (1976), did not render the application of the statute to petitioner unconstitutional, particularly in light of the ultimate disposition of the *Snead* litigation and conflicting state court precedent. The District Court also found that on the undisputed facts presented, even assuming that the federal court determination of unconstitutionality was binding precedent, petitioner's claim would still fail due to the presence of adequate safeguards to petitioner's constitutional rights.

The Opinion of the Court of Appeals

On December 11, 1979, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court

for substantially the reasons stated by the District Court in its decision. Petitioner's motions for rehearing with a suggestion for rehearing en banc were denied by the court on April 8, 1980.

REASON FOR DENYING CERTIORARI

The Court below correctly held that the direction to petitioner to appear for a medical examination pursuant to New York Civil Service Law § 72 during the pendency of *Snead* v. *Department of Social Services of the City of New York* was not unconstitutional on the facts presented and in light of contrary state court determinations.

Petitioner claims that his employers had no authority to direct him to appear for a medical examination under New York Civil Service Law § 72 because that statute had been declared unconstitutional by a lower federal court in *Snead* v. *Department of Social Services of the City of New York, supra.* Hence, he argues, the application of the statute to him was unconstitutional.*

Petitioner's contention is without merit on two grounds. First, petitioner chooses to ignore the fact that even assuming the District Court finding of unconstitutionality in *Snead* was binding precedent, it would not support his claim. The challenge by Ms. Snead was based on her

---

* It should be noted that petitioner does not and has never challenged the constitutionality of Civil Service Law § 72. In a recent case in which the statute was challenged, the United States District Court for the Southern District of New York, on facts distinct from those presented herein, declared Section 72 unconstitutional on the ground that it fails to provide minimal due process safeguards. See *Laurido* v. *Simon,* 489 F. Supp. 1169 (SDNY 1980). In *Laurido,* a permanent civil service employee after a medical examination was placed on involuntary leave of absence on a finding of mental unfitness without notice of the facts on which the finding was based and without an opportunity to challenge those facts.

placement on an involuntary leave of absence *without* pay following a determination, after a medical examination, that she was mentally unfit to perform her duties. No hearing was provided prior to such placement. The District Court in *Snead* found Section 72 constitutionally defective on the ground that no hearing was provided by that section. The court stated:

> "Although we hold that defendants must conduct an adversarial hearing before placing civil service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action, we do not prescribe the precise form such hearings should take. It is up to the state to determine which of the many potential formats it deems most appropriate. All that the Constitution requires is that before involuntary leaves of absence are effectuated, which may continue for one year without pay, tenured civil service employees charged with a mental disability be granted a hearing containing the 'rudimentary due process' necessary to the accurate determination of the validity of the allegation. This section 72 fails to do." 335 F. Supp. at 773. (Footnotes omitted).

In contrast, petitioner herein never appeared for the medical examination, was informed of the charges against him, afforded the opportunity for a hearing and continued on the payroll until he failed to take advantage of the available procedures. Indeed, petitioner does not contest the adequacy of the procedures afforded him. Thus, the constitutional defect found in *Snead* is not present herein.*

---

* The *Snead* court did not require a hearing prior to a Section 72 direction to appear for a medical examination.

(footnote continued on following page)

Equally devastating to petitioner's argument is the fact that during the period in question, CSL § 72 had *not* been declared unconstitutional by New York state courts. Indeed, to the contrary, during the time that the *Snead* District Court determination of unconstitutionality was purportedly binding as to respondents,* New York courts, in the very judicial district in which SBPC is located, affirmatively required the use of the procedures and requirements of Section 72. See *Matter of Penebre* v. *Dzaluk,* 51 A D 2d 574, 378 N.Y.S. 2d 767 (2d Dept. 1976); *Matter of Brockman* v. *Skidmore,* 43 A D 2d 572, 349 N.Y.S. 2d 120 (2d Dept. 1973). See also *Matter of Barhite* v. *Dyson,* 63 A D 2d 1051, 405 N.Y.S. 2d 816 (3rd Dept. 1978); *Matter of Cooperman* v. *Commissioner,* 86

(footnote continued from preceding page)

> "For example, the State may choose to retain the current psychiatric examination and hold an adversary hearing after its completion and introduce it as evidence at that proceeding. No doubt there are other alternatives. It is also appropriate to note that due process does not require both a prior and subsequent hearing. Goldberg v. Kelly, 397 U.S. 254, 267 n. 14, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) . . ." *Snead* v. *Department of Social Services of the City of New York, supra,* 355 F. Supp. at 773, n. 38.

See also *Leonard* v. *Sugarman,* 466 F. 2d 1366, 1367 (2d Cir. 1972).

* An examination of the history of the *Snead* litigation reveals that except for a short period of time in its active life of approximately four years, a stay was in existence. On March 29, 1973, following the District Court's first decision (355 F. Supp. 764), a stay was granted pending disposition of an appeal to this Court. On February 13, 1975, the State's motion for a stay was denied following the District Court's second decision (389 F. Supp. 935). A similar application to Justice Blackmun was denied on April 7, 1975. The absence of a stay continued to May 27, 1975 when this Court vacated the District Court judgment and remanded for consideration of the question of mootness (421 U.S. 982). Jurisdictional Statement for Appellants in *Civil Service Commission of the State of New York* v. *Snead,* dated December 4, 1975, pp. 3-9.

Misc. 2d 610, 382 N.Y.S. 2d 700 (Sup. Ct. Albany County 1976).

If petitioner is correct, state officials would be bound, no matter what the pronouncements of state courts, to follow a contrary lower federal court determination while the latter is being vigorously litigated. Such is not the law either in federal, see *United States ex rel. Lawrence* v. *Woods,* 432 F. 2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971), or New York state courts, see *Walker* v. *Walker,* 51 A D 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976); *Matter of Greenwald* v. *Frank,* 47 A D 2d 628, 631, 363 N.Y.S. 2d 955, 959-960 (2d Dept. 1975) (*Shapiro,* J., dissenting).

The standard of conduct petitioner seeks to impose on respondents is also unreasonable. It not only requires respondents to make judgments as to which legal determination to follow but assumes they can "predict the future course of constitutional law." *Procunier* v. *Navarette,* 434 U.S. 555, 562 (1978). This point is only further emphasized by the fact, which petitioner seeks to minimize, that the final result of *Snead* was the vacatur of the determination of unconstitutionality of Section 72 by this Court on the basis of a lack of standing of Ms. Snead and a direction to the District Court to dismiss the complaint. 425 U.S. at 458-459.

Section 72 was therefore not unconstitutionally applied to petitioner and the findings of no merit to this claim by the District Court and the Court of Appeals were correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 4, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

SHIRLEY ADELSON SIEGEL
Solicitor General

PATRICIA C. ARMSTRONG
Assistant Attorney General
of Counsel

APPENDIX "1"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Present: HON. HAROLD R. MEDINA,
HON. WALTER R. MANSFIELD,
HON. THOMAS J. MESKILL,
Circuit Judges.

79-7103

EUGENE B. DINKIN,
Plaintiff-Appellant

v.

DINU GANEAU, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON, ARNOLD WINSTON,
Defendant-Appellees

A petition for a rehearing having been filed herein by Pro-Se Eugene B. Dinkin

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

by ROLANNE HENRY
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

79-7103

EUGENE B. DINKIN,

Plaintiff-Appellant

v.

DINU GANEAU, KENNETH GLATT, ALVIN MESNIKOFF, JACK O'BRIEN, PATRICIA OULTON, ARNOLD WINSTON,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by Pro-Se Eugene B. Dinkin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Irving R. Kaufman